

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

76-4104

ORIGINAL

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

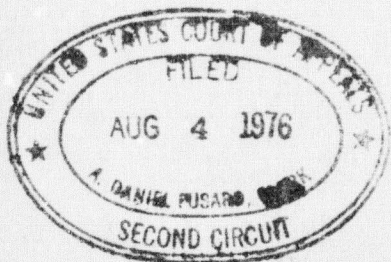
MONROE TUBE COMPANY, INC.,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

**BRIEF FOR RESPONDENT MONROE
TUBE COMPANY, INC.**

B
P/s



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NATIONAL LABOR RELATIONS BOARD,
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MONROE TUBE COMPANY, INC.,
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ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

**BRIEF FOR RESPONDENT MONROE
TUBE COMPANY, INC.**

Counterstatement of the Issues Presented

(1) Whether there is substantial evidence to support the Board's finding that Respondent unlawfully solicited card withdrawals and interrogated employees about their union activities.

- (a) Whether James Verbert was an agent of Respondent when he allegedly engaged in the unlawful conduct.
- (b) Whether the Board improperly drew an adverse inference against the Company from the fact that Verbert, whose status as an agent of the Company was disputed, was not called to testify, even though the Respondent presented direct testimony on the issue.

- (c) Whether this is not a case in which the matters alleged to be violations of the Act are so de minimis as not to warrant enforcement of the Board's order.

(2) Respondent asks the Court to review the propriety of the Board's ordering a new election among the employees.

- (a) If the new election is designed to remedy the unfair labor practices, the question is whether any substantial rationale for such remedy has been advanced by the Board.
- (b) If the new election is not a remedy for the unfair labor practices, but an exercise of the Board's representation case powers, then Respondent asks the Court under its ancillary jurisdiction to determine whether the Board did not abuse its discretion in radically altering its prior case law and failing to abide by its own established rules and procedures.

Counterstatement of the Case

Respondent employs about 50 employees in the manufacture of metal tubing at its one plant in Monroe, New York (A. 50).¹ Early in August of 1973, the union began an organizing drive. On August 16, 1973, the union filed an election petition, which it withdrew on September 5th. A new petition was filed on September 6, 1973 (A. 50). Both the Company and the union took part in an aggressive election campaign based upon the September 6th petition, none of which, though scrutinized by the Board, was held to constitute either an unfair labor practice or conduct of such an objectionable nature as to warrant setting aside

¹ "A" references are to pages of the printed appendix.

the election (A. 56-57, 79-91). The election, on October 12, 1973, resulted in the employees rejecting the union 22 to 15, with seven ballots challenged by the union, but undeterminative (A. 50). The union filed timely objections to the election based on alleged threats made in speeches to employees, but the Board ultimately found insufficient evidence to support the allegations and dismissed the union's objections (A. 56-57).

After the time for filing objections to the election had expired, the union filed an unfair labor practice charge. The charge alleged the same speech threats alleged in the objections and in addition alleged that the Company had unlawfully solicited employees, sometime before the petition for election and two months before the election, to withdraw union authorization cards they had signed (A. 48). Complaint issued on these allegations. The objection and unfair labor practice allegations were consolidated for purposes of a hearing. A hearing was held in January 1974. During this hearing, additional allegations were made concerning interrogation of employees, also some two months before the election and before the petition. One issue litigated was whether James Verbert, who allegedly conducted some of the unlawful solicitation and interrogation, was in fact a supervisor and agent of Respondent (A. 51).

The Board rejected the decision of the Law Judge in toto because the decision reflected a bias and prejudice against Respondent, which precluded adoption of the credibility findings of the Judge (A. 65-66). The Board decided the Case on the record. The Board found that the speech threats did not occur. Over the dissent of Board member Pennello, Board members Fanning and Jenkins directed a new election, in addition to the usual cease and desist and notice posting order (A. 56-57).

Respondent appeals from the Board's unfair labor practice findings, order and remedy, including the direction of another election.

Summary of the Argument

- I. Substantial Evidence Does Not Support The Board's Finding That Respondent Unlawfully Solicited The Withdrawal Of Authorization Cards Because:
 - A. The finding of the Board that Verbert was a Supervisor within the meaning of the Act is not supported by substantial evidence in the record.
 - B. The Board's finding was based in substantial part upon an improper presumption made to operate against Respondent.
 - C. The conduct attributed to Respondent with respect to the solicitation of the withdrawal of authorization cards does not violate the Act.
- II. Substantial Evidence Does Not Support The Board's Finding That Respondent Unlawfully Interrogated Employees Because:
 - A. General Counsel did not meet his burden of proof with respect to the *Bourne* standards for evaluating whether questioning is unlawful.
- III. Enforcement Of The Board's Order Should Be Denied Because The Nature And Effect Of The Violations Found Is De Minimis.
- IV. Under Its Ancillary Jurisdiction The Court Should Review And Set Aside The Board's Order That A New Election Be Held.
 - A. Acceptance of this issue is appropriate in the interest of judicial economy and efficiency.
 - B. Viewed as an exercise of its Section 9 power to make rules respecting representation elections, the Board abused its discretion by (1) setting aside an

election based on conduct not brought to the attention of the Board until long after the time for filing objections had expired; (2) arbitrarily extend its "critical period" rule to encompass a time prior to the filing of the operative election petition; (3) without substantial evidence, determining that the "objectionable conduct" took place within the critical period; and

- C. The Board has not articulated any reasonable basis for its implicit holding that the card withdrawal solicitation and interrogation of just four employees, two months before the election, conduct which the union did not bother to allege as a basis for setting aside the election, warranted a new election.

ARGUMENT

I. Substantial Evidence Does Not Support The Board's Finding That Respondent Unlawfully Solicited Withdrawal Of Authorization Cards.

A. The Finding Of The Board That Verbert Was A Supervisor Within The Meaning Of The Act Is Not Supported By Substantial Evidence In The Record.

In the Proposed Decision, later adopted, the Board found "night foreman" Verbert to be a supervisor and an agent of Respondent based on a careful picking and choosing of "facts" and testimony which ignored other equally weighty evidence and contradictory evidence.

The record shows that the Respondent operates a small (8 employees) "night" shift from 4:30 P.M. to 1:00 A.M. (A. 108, 112). During the evening shift, the owner, Mr. Grout, is in the plant 4 out of 5 nights, Plant Manager Romer is usually present the first two hours, and other

supervisors, including Plant Superintendent Monks, are also periodically present (A. 108, 114). At the start of this shift, Verbert reports to mill foreman Mancuso who gives Verbert a prepared form with instructions for production and assignments of particular employees during the shift (A. 114, 115). Verbert, unlike other supervisors, does not have an office, nor does he attend management meetings (A. 110, 111). His main job is to keep track of material as it moves through the plant's production process (A. 112). He is expected to check on the work of the other employees, show them how to perform the work, perform the set-up work and report to Mancuso any action concerning emergency personnel situations (A. 109, 110, 111). He spends about 50% of his time doing the same work as the rest of the night employees (A. 51, 109, 110). No one was designated as responsible in the sense of having direct supervisory authority during the evening hours (A. 109). This testimony was corroborated by General Counsel's witness Mendoza, a night shift employee (A. 141-142). The responsibility for issuing formal warnings and making employee evaluations rests with Plant Manager Romer (A. 101, 105). Verbert is salaried, not hourly like the other shift employees, and his compensation is 30% higher than the average wage of the others (A. 51, 110).

The facts are consistent only with a determination that Verbert fills the role of a non-supervisory leadman and is compensated as such. The Board's one paragraph summary of this issue is inaccurate, misleading and unsupported by substantial evidence in the record. The Board did not and cannot equate the description of Verbert's duties and authority with the statutory definition of a supervisor in Section 2(11) of the Act.

Section 2(11) of the Act, 29 U.S.C. Sec. 151 et seq., lists twelve facets of personnel authority, any one of which may confer supervisory status if the individual is shown:

(1) to have the authority to take or effectively recommend the action, and (2) to use independent judgment in the exercise of such authority. The twelve are: hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward, discipline, responsibly direct and adjust grievances. None of these criteria are mentioned in the Board's treatment of this issue. The evidence set forth by the Board² omits other evidence revealing how Verbert's authority is routine and restricted. The decision relates, for example, that Verbert "allocates work" to employees without also mentioning the uncontradicted evidence that his instructions in this regard are given to him at the start of the shift by the mill foreman. The Board appears to draw an inference of supervisory status from the fact that Verbert is frequently the only person present, ignoring the uncontradicted and substantial evidence that other Company representatives are often in the plant and in any case are always available in the case of an emergency.

Apart from the allocation of work, the only statutory factor cited by the Board involves the allegation that Verbert "can move people from one job to another if necessary". Evidence on this point is sparse,³ does not

² The complete text of the Board's discussion of this issue follows: "Plant Superintendent Monks testified that Verbert, as "night foreman," is "responsible for 8 people" (i.e., the night shift). Frequently during the night shift, no one higher in rank than Verbert is present. Verbert allocates work to employees and, according to Monks' estimates, spends no more than 50 percent of his time doing the physical work that the other employees do. As to the employees' work, Verbert is to "keep a check on it," and he can move people from one job to another if necessary. Verbert is salaried (earning 30 percent more than other night-shift employees), but the 8 other night shift employees are hourly. Various night-shift employees, including Nowak and Willard, testified that Verbert was their supervisor. Based on the above, we find that Verbert is a supervisor within the meaning of the Act."

³ (A. 110, 145). Verbert is said to have the authority and to exercise it in certain instances, to change people from one job to another "if something gets slow in one area." (A. 110).

warrant any inference or conclusion that this authority involves anything more than the movement of an employee from one work bench to another or that it is anything but routine, insignificant and within the parameter of his shift instructions.

The Board has the burden of proof on this supervisory issue. The Board and courts have always recognized that the sporadic or infrequent exercise of supervisory authority does not constitute one a supervisor. This court has noted that employees with minor supervisory duties, such as straw bosses and leadmen, were not intended to be excluded from the coverage of the Act under the tests of Section 2(11). *Precision Fabricators v. NLRB*, 204 F2d 567, 568 (2d Cir., 1953). The Board itself has stated the correct view of the power to assign duties: "The assignment of employees to other departments to meet variation in customer demands does not establish the power effectively to assign, within the meaning of the statutory definition of a supervisor."⁴

The Board does not have carte blanche to draw the line between the supervisor and the non-supervisory leadman arbitrarily or without rational basis, or in a manner which leaves Board case law in a hopeless welter and confusion under which the standard is unreasonably difficult to discern. The Court of Appeals for the Fifth Circuit has recently stated that the great deference paid to the NLRB's findings does not detract from the general obligation of the court to determine whether the NLRB's conclusions are supported by substantial evidence on the record considered as a whole and whether its application of the statutory

⁴ *Crest Chemical Corporation*, 213 NLRB No. 118, 87 LRRM 1257 (1974); *J. C. Penney Company, Inc.*, 193 NLRB 684, 78 LRRM 1395 (1971). In this case the General Counsel did not even prove as much authority as had the employees in the *Crest* case, whom the Board found not to be supervisors. See also *Cameron Iron Works, Inc.*, 194 NLRB 168, 78 LRRM 1563 (1971), enf'd 464 F.2d 609 (5th Cir. 1972).

definition of supervisor had a reasonable basis in law. *GAF Corporation v. NLRB*, 524 F.2d 492 (5th Cir., 1975).

Evidence in the record simply does not warrant any conclusion that Verbert has any of the statutory authority set forth in Section 2(11) of the Act, and the Board's finding that Verbert is a supervisor within the meaning of the Act is not supported by substantial evidence. *NLRB v. Brake Parts Company*, 447 F.2d 503 (7th Cir. 1971); *NLRB v. Metropolitan Life Ins. Co.*, 405 F.2d 1169 (2d Cir., 1968); *NLRB v. Cousins Associates, Inc.*, 283 F.2d 242 (2nd Cir., 1960). In these circumstances and in the absence of any evidence that Verbert was either directly authorized to engage in the allegedly unlawful conduct or that this conduct was substantially ratified by the Company the unfair labor practice allegations attributable to Respondent on the basis of Verbert's conduct should not be affirmed.

B. The Finding Of The Board Was Based In Substantial Part Upon An Improper Presumption Made To Operate Against Respondent.

The Board held that Respondent violated Section 8(a)(1) by encouraging and assisting employees to withdraw signed authorization cards. It did so for two stated reasons: (1) the uncontradicted testimony of employees Nowak, Willard, Rosenstock and Sinsabaugh; and (2) the failure of Respondent to call employees Verbert and Romer to testify, which failure "gives rise to a presumption that their testimony would have been unfavorable to Respondent". (A. 52).

Respondent submits that the failure to call Verbert and Romer may not be used as a basis for a finding of a violation. The Board's language seems to warrant an inference that the testimony of the employees alone does not in itself support the finding, but needs the force of the presumption to establish an unfair labor practice. If that is

not the meaning of the Board, then the Board should be required to explicate its reasoning, since the presumption raised by the Board is totally improper. It is the burden of the General Counsel to prove the violation. Respondent denied the unfair labor practice allegation in its answer and at least with respect to these 8(a)(1) allegations chose to rest on this answer after the close of the General Counsel's case in chief. Respondent contends that the General Counsel has not proved a violation—even if the testimony of the four employees is totally credited. In such circumstances, it is proper to draw an inference from the failure of the Company to call its supervisor, Romer, but the proper inference is that Romer would not contradict the testimony of the employees. It is not proper to draw an inference that Romer would testify “unfavorably” to Respondent.

With respect to the failure to call Verbert, no inference can be drawn against Respondent since Verbert is not and has always been contended by the Company not to be a supervisor or an agent of the Company. Verbert was available to General Counsel for testimony if General Counsel so desired. General Counsel did not call Verbert as a witness. The Company called its plant management representatives to testify concerning the extent of any authority they had vested in Verbert. Respondent believes it is proper in these circumstances to draw an inference against the General Counsel, who failed to meet the Company's clear and direct evidence by producing Verbert, if his testimony would help General Counsel. See 2 *Wigmore, Evidence*, Section 288 (3d ed. 1940). It is improper to draw any inference against the Company except possibly that Verbert would not deny the facts as testified to by the other employees. Such an inference is far different from a presumption that had he been called, Verbert would have testified unfavorably to the Company, a presumption on which the Board has ostensibly based its unfair labor practice finding in this Case.

In certain circumstances, this Court has recognized that it is proper to draw an inference or a presumption against a party if the party fails to produce a witness within its control who has specific and unique information relative to a position taken by that party. *United States v. Beekman*, 155 F. 2d 580 (2nd Cir., 1950). However, such a presumption is not to be applied lightly. There are certain restrictions on the drawing of such a presumption. They include the prohibition of drawing such a presumption unless the witness is naturally favorable to the party, the party calls other witnesses on the issue, and the witness is not fully available to both parties. See *Jenkins v. Bierschenk*, 333 F.2d 421 (8th Cir., 1964).

This is not a case in which the presumption can be properly drawn. In this case, any presumption arising from the Company's failure to call Verbert must itself arise out of a preliminary finding that Verbert is an agent of Respondent—a matter which is and throughout the proceeding was in litigation and contested by Respondent. It could hardly be said at the time of trial that the testimony of Verbert would naturally be favorable to Respondent. Moreover, on the question of solicitation of withdrawal of authorization cards and on the question of interrogation, Respondent did not present any evidence at all. To draw any inference from this failure is to improperly require that the Respondent give up any right to challenge the Board's having presented a prima facie case and is inherently inappropriate. See 2 *Wigmore*, supra, Section 290(5), (5a). Finally, authorities make it clear that in general the court does not really indulge a presumption at all but merely draws an inference, an inference which is not the equivalent of direct evidence. See generally, 31A C.J.S., Section 156(3); 2 *Wigmore*, supra, Section 288. Thus, the reliance by the Board on Respondent's failure to call Romer and Verbert is erroneous and prejudicial and the unfair labor practice finding based on that reliance should not be affirmed.

C. The Conduct Attributed To Respondent With Respect To The Solicitation Of The Withdrawal Of Authorization Cards Does Not Violate The Act.

Assuming that Verbert is a supervisor and an agent of Respondent and that the Board did not erroneously rely on an improper presumption prejudicial to Respondent, the Court should, nevertheless, decline to enforce the Board's Order insofar as it is based on the solicitation allegations.

Each of the four incidents set forth in the Board's Proposed Decision and Order, later adopted, were found implicitly by the Board to have involved Employer coercion. The incidents involve employees Willard, Sinsabaugh, Nowak, and Rosenstock (A. 51-52). According to employee *Willard*, Verbert asked him to sign a form letter requesting his card back, which Willard did (A. 153). No such request was ever submitted to the union, however (A. 179-180), and the clearest part of the testimony of Willard is that this request and the signing took place at the Company picnic during which both were drinking (A. 154). Willard's recollection was so foggy that he testified to uncertainty as to whether he may have signed more than one such letter that day (A. 154). In view of the fact the Board supported this evidence with the unfavorable presumption drawn from Verbert's not being called to testify, Verbert's very low status as a management representative, if any, the circumstances of the picnic and the drinking, the fact the alleged letter never turned up with the union, and the complete absence of any evidence such as would indicate any coercive intention on the part of Respondent toward Willard, the Board's position is unsupportable.

Equally unsupportable is the finding of a violation in connection with *Sinsabaugh's* testimony that Romer gave him the union address to use in getting back his union card together with a batch of slips with the union's ad-

dress for anyone else interested (A. 52). No case has ever held that an employer may not provide its employees with the address of the union and the Board failed to explain its rationale. The Board decision is especially susceptible of criticism because it ignores Sinsabaugh's own testimony that he wrote a withdrawal letter voluntarily without anyone asking him directly and that Romer gave the address to him because Sinsabaugh initially asked Romer for it (A. 168, 171-173). Respondent submits that this blatantly injudicial error warrants the Court's close scrutiny of the Board's Order and the basis therefor. The testimony of Sinsabaugh is also noteworthy in another respect: Romer at no time followed up with him to see if Sinsabaugh had asked for the card back or passed out the slips (A. 174-175). This is hardly consistent with the Board's position that the Company was engaged in an intense effort to coerce employees into getting their cards back and was keeping tabs on the success of the effort.

Romer's conduct is also alleged by the Board to have been unlawful because he went to employee *Nowak* with a withdrawal letter which Nowak had signed. Romer asked Nowak to complete the information by putting the Company's name in it. Nowak was sufficiently uncoerced in this situation that he told Romer that he would not do so, and he did not (A. 144). The Board attempt to color the whole incident with an unfair labor practice tinge is based upon its remark that Romer became "flustered and then left" (A. 51). This court should not rely upon such insubstantial circumstance and should find that Romer's conduct did not interfere with, restrain or coerce Nowak or Sinsabaugh in the exercise of their rights.

The non-coercive conduct of supervisor Romer lends no weight at all to the Board's conclusion that Respondent was engaged in an intensive effort to coerce employees into withdrawing their authorization cards. The conclu-

sion thus must rest on the Board's finding that Verbert was an agent of Respondent and that he violated the Act by his conduct with Nowak and Rosenstock. The facts with respect to these employees are clear. Verbert asked Nowak to sign a request for the return of the card and Nowak did so. However, Nowak told Verbert not to turn the request into the Company because he was going to draft his own letter to the union. Verbert disregarded Nowak's instructions and turned in the request but as noted above, Nowak resisted completion of the withdrawal letter when supervisor Romer approached him about it (A. 143-144). In short, Nowak partially filled out the paper at Verbert's request but with the express reservation that it was not to be effective. Even with Romer, Nowak successfully resisted completing the request and expected to suffer no consequences for it. Whatever Nowak's motive for giving Verbert the partially filled out request in the first place, the continued and successful refusal of Nowak to make an effective withdrawal is plain and uncontradicted evidence of an absence of any coercion on the part of Respondent.

Finally, the Board found a violation in Verbert's question to *Rosenstock* whether he wanted to get his card back and Verbert's offer to give Rosenstock the union's address (A. 51). Rosenstock said he wasn't sure and there was no further inquiry made by Verbert or Company representatives (A. 157-158). A week or so later, Rosenstock did write a letter asking for the card back and voluntarily brought it to Verbert (A. 158). In view of Rosenstock's initial refusal to state his position one way or the other and the absence of any follow-up by Verbert or any other Company representative, it is not appropriate to draw any inference that the inquiry and the offer by Verbert to give Rosenstock the union's address constituted unlawful coercion.

Respondent does not contend that an employer's solicitation of employees to write to the union for the return of

their cards may not violate the Act. But such solicitation, to be unlawful, must be analyzed to determine whether there is a background of employer hostility and discrimination toward pro-union activity and whether the employer's words or procedures were coercive, i.e. fear inspiring.

Respondent at the time of these incidents had expressed its intention to resist unionization and its opinions as to the nature and effect of the authorization cards (A. 71-78). It had not indicated any hostility toward, much less discriminate against, employees engaging in union activities.⁵ Respondent did attempt to persuade employees that the signing of cards without hearing both pros and cons was unwise, and did offer some purely mechanical aid to those interested in seeking the return of their cards. Three of the over forty employees were approached by Verbert, for whose conduct the Employer is but dubiously responsible. Two of these three effectively rejected Verbert's approach, and the third apparently acquiesced (if the General Counsel actually proved this incident) while drinking at the Company picnic. Whatever the reason for the acquiescence, whether it be the drink, the conviviality of the occasion, a friendliness or compassion for Verbert, or fear of reprisal—no person can say on this record, much less make a finding of fact based on substantial evidence.

In its foremost case on this subject, this Court refused to find any violation where an Employer canvassed over

⁵ Respondent commends to the attention of the Court the recent expression by the Fifth Circuit in *NLRB v. Huntsville Manufacturing Company*, 514 F.2d 732 (1975): "We would note here that the Board apparently equates in this case an employer's opposition to the union with an anti-union animus. The Act does not mandate that employers willingly embrace union representation of their employees nor do we think that opposition to a union can be converted into an anti-union animus without some proof, absent here, that the employer engaged or has engaged in the past in a pattern of conduct hostile to unions."

half of its employees about union membership and asked those without membership to sign a petition so declaring. *Firedoor Corporation Of America*, 291 F.2d 328 (2nd Cir., 1961). Here, as in *Firedoor*, there is no implicit coercion, where the Employer's purpose was lawful, it had no history of anti-union discrimination, the inquiries were limited in scope, the matter was pursued in a casual manner, and the employees were not cowed by the conduct. The cases cited in the Board's brief in support of its finding on this point are inapposite, since those cases involved Employers who summoned employees to management offices to sign the withdrawals, and accompanied this conduct with substantial other unlawful conduct, including coercive interrogation, threats, promises of benefit, and unlawful surveillance efforts.

II. Substantial Evidence Does Not Support The Board's Finding That Respondent Unlawfully Interrogated Employees.

General Counsel Did Not Meet His Burden Of Proof With Respect To The *Bourne* Standards For Evaluating Whether Questioning Is Unlawful.

The Board's finding and conclusion on interrogation involved two incidents, in each of which Verbert questioned an employee about the signing of authorization cards (A. 52).⁶

The evidence does not support the Board's conclusion, and analysis of that evidence demonstrates that it fails to meet this Court's standards set forth in *Bourne v. NLRB*, 332 F. 2d 47 (2nd Cir. 1964), for determining when inquiry violates the Act. As set forth in that case, proper analysis should consider: (1) the background of the case, including whether there is a history of employer hostility

⁶ This discussion assumes, *arguendo*, that Verbert is found to have been proved to be Respondent's agent.

and discrimination; (2) the nature of the information sought, e.g. whether the interrogator appears to be seeking information on which to base taking action against individual employees; (3) the identity of the questioner, i.e. how high he was in the company hierarchy; (4) where the interrogation took place, involving considerations of whether it took place in an atmosphere of unnatural formality; and (5) the truthfulness of the reply.

The Board found that Verbert questioned Willard as to what other employees had signed cards. The complete evidence on this issue developed out of questioning by the General Counsel as to when Verbert first asked Willard about getting his card back (A. 155-156):

Q. Do you recall the first time he asked you?

A. No, I don't remember when it was. I know, it was before the clambake though.

Q. Well, the first time he asked you to get it back, did he tell you how he knew you had signed the card?

A. I think I told him I signed it when he asked me.

Q. He asked you if you signed one too?

A. Yes, I told him anyhow I signed one—one of the cards.

Q. Did he ask you if anyone else signed?

A. Yes. Yes, sir.

Q. Who did you tell him?

A. I am not the only one. I know others signed. I knew other people signed.

The General Counsel failed entirely to develop the circumstances surrounding this conversation, how the conversation originated, when it took place, who was present, who first brought up the subject, when it occurred, and the manner and words actually used by Verbert. Willard's unsure response, "I think I told him I signed it when he asked me" should be read in conjunction with his use of the word "anyhow", the context of which carries the clear

inference that Willard was making two points, (1) that he did tell Verbert that he had signed a card and (2) that he was uncertain if Verbert had asked the question. On this evidence, no reasonable analysis under *Bourne* yields any conclusion but that the Board has simply not met its burden of proof.

The other interrogation incident cited by the Board found its way into the record when employee Rosenstock testified that Verbert asked him whether or not he signed an authorization card (A. 157-158):

Q. Mr. Rosenstock, after you signed that particular card, did Mr. Verbert ever ask you whether or not you had signed for the union?

A. You are talking about the union card now?

Q. Yes.

A. He asked me if I had signed a card.

Q. When did he ask you that?

A. It might have been a week or two after I signed the card.

Q. Was this before you sent in the letter to the union?

A. Somewhere around that area.

Q. Was it before or not?

A. I think he asked me if I signed the card before.

Q. You sent in the letter?

A. Before I sent in my letter, yes.

Q. Did he say anything else?

A. Well, he asked me if I was serious when I signed the card and at that time I told him I really don't know.

Q. What else did he say?

A. That was it.

Evaluating this conversation by the *Bourne* standards, one can find no basis for concluding that the inquiry violated the Act. First, there was no history of Respondent

discriminating against pro-union employees nor any expression of animus. The most that the Board has demonstrated is that Respondent openly and lawfully had announced it would resist the union and that the cards could have important legal consequences. Second, there is nothing in the record to show that Verbert was seeking information on which Respondent would base action against individual employees. Third, the questioner was at most at the very bottom of the Company's management staff. Fourth, there was no circumstance of unnatural formality. And fifth, the response by Rosenstock in no way indicates that the inquiry inspired fear as required by this Court under *Bourne*. *General Stencils, Inc. v. NLRB*, 438 F.2d 894 (2d Cir., 1971); *NLRB v. Huntsville Manufacturing Company*, *supra*.

III. Enforcement Of The Board's Order Should Be Denied Because The Nature And Effect Of The Violations Found Are *De Minimis*.

This Court has previously decided that it is appropriate in some circumstances to deny enforcement to a Board order where the Board has found unfair labor practices to have been committed, but where the violations are viewed by the court to be *de minimis*. *J. J. Newberry Company, Inc.*, 442 F.2d 897 (2d Cir., 1971). The Board also sometimes dismisses Complaints despite the existence of "technical" violations for just this reason. See, for example, *American Federation of Musicians, Local 76*, 202 NLRB No. 80, 82 LRRM 1591; *Thermalloy Corp.*, 213 NLRB No. 26, 87 LRRM 1081.

In this case, no specific analysis was made by the Board as to whether its administrative and judicial resources should be spent on this matter or whether it would effectuate the policies of the Act to proceed in a case of this nature.

Respondent submits that the interrogation and card solicitation incidents fall within the category of insubstantial conduct not warranting a remedial order. In support of this contention, Respondent calls to the Court's attention the following factors: (1) the conduct was committed by a person whose status as a representative of management is a very close question at best; (2) the nature of the incidents is patently minor and do not go to the heart of the Act; (3) for two months after the incidents occurred, a clean and objection free election campaign was waged and the employees were informed of and permitted to exercise their statutory rights; (4) the union did not allege this conduct in its objections to the election; and (5) the Board's decision lacks any analysis as to how the conduct found to be violative did result in interference, restraint or coercion of the employees involved.

Respondent urges this Court to apply the Board's own analysis which it has applied to the *American Federation of Musicians* case and others, and deny enforcement to this order because the conduct involved is de minimis. *J. J. Newberry Company, Inc., supra.*

IV. Under Its Ancillary Jurisdiction, The Court Should Review And Set Aside The Board's Collateral Order That A New Election Be Held.

A. Acceptance Of This Issue Is Appropriate In The Interest Of Judicial Economy And Efficiency.

As a consequence of the consolidation of the unfair labor practice and objectionable conduct allegations, the litigation before the Board involved both the unfair labor practice charges and the union's objection to the election based on the owner's speeches to employees. While the Board dismissed the objections and unfair labor practice charges based on the speeches, the Board concluded that

the other matters found to have been unfair labor practices also constituted objectionable conduct. Thus, on the basis of these unfair labor practices, rather than on the actual election objections, the election was set aside.

In its Brief, the Board apparently argues (P. 6, n. 5) that the election order is not before the Court as it does not constitute a final order of the Board. As a matter of determining the original jurisdiction of the Court, the Board position is generally correct, with exceptions considered later. *Boire v. Greyhound Corporation*, 376 U.S. 473. However, notwithstanding the rule as it applies to original jurisdiction, Respondent submits that this election order can appropriately be considered by the Court at this time. That the Court generally has the power to review a collateral matter under its ancillary jurisdiction is amply supported by the authorities. 36 C.J.S. *Federal Courts*, Section 13(1); Wright, Miller and Cooper, *Federal Practice and Procedure*, Sections 3523, 3911.

The discretion of the Court would be appropriately exercised in favor of reviewing the election order in this case because: (1) the order of a new election is based wholly upon the unfair labor practice findings made by the Board and which are before the Court; (2) should an election be held without review of the Board's election order, the potential for post-election litigation by either the Union or Respondent is great, and this issue may ultimately be presented to the Court in any case.

The Board's unfair labor practice findings are the source of the Order for a new election. No objections to the election were filed based upon the unfair labor practice conduct. The sole objection that was filed was dismissed by the Board. The action of setting aside the election and ordering a new one is remedial in nature, and as such is within the scope of the Court's original jurisdiction of this suit. The Board's effort to dissociate the representation and unfair labor practice cases is based upon a contention

that the unfair labor practices also constitute objectionable conduct, and that since this conduct was discovered in connection with litigation over whether other conduct was objectionable, it may be found to have interfered with the election, notwithstanding the absence of any objections to the election based on it. Should this Court hold, however, that for any reason some or all the unfair labor practice findings of the Board cannot be affirmed, then the underpinnings of the representation case decision are weakened if not destroyed. In these circumstances, it is appropriate to review the order of election.

In addition to essentially being a remedial consequence of the unfair labor practice findings, the Court should consider that the issue is one which is reasonably likely to ultimately come before the Court in the future, after substantial expense to be expended by the parties and by the Board. The one circumstance which might avoid such litigation would be a clear and lopsided vote by the employees against the union, in circumstances where no valid objections (or unfair labor practices) took place on which that election could be set aside. That possibility is but one of a number of possibilities, and the Court might prevent a substantial amount of unnecessary governmental, judicial and private time and financial expenditures by ruling on this issue at this time.

Respondent commends to the Court's attention the Fifth Circuit case of *NLRB v. Reliance Steel Products Company*, 322 F.2d 49 (1963) in which the procedural questions were substantially identical to this case. There, in connection with various unfair labor practice findings, the Board set aside an election and ordered another based on the unfair labor practices, objections to the election having been dismissed as untimely filed. Rather than declining to consider the representation case matter, the court addressed and decided the issue, as Respondent requests this Court do in this case.

Should the Court rule that the election order is not reviewable as a collateral or ancillary matter, Respondent submits that the *Kyne*⁷ exception to the final order requirement is applicable in this case. That exception covers those Board representation case decisions or actions which are "in excess of its delegated power and contrary to a specific prohibition of the act".⁸ As the Fifth Circuit has held, the *Kyne* exception is available where the Board fails to exercise its statutory responsibility. *Templeton v. Dixie Color Printing Company, Inc.*, 444 F. 2d 1064 (1971). In this case, the Board has issued an order setting aside an election and ordering another, without any explanation of the basis for its ruling such as is required by the Administrative Procedure Act, 5 U.S.C. 557. Moreover, the order is based on an underlying procedure which is directly at odds with the clear holdings and rationale of prior Board precedent (see pages 24-26, *infra*). Thus, the *Kyne* case authorizes this Court to review the election order.

B. Viewed As An Exercise Of Its Section 9 Power To Make Rules Respecting Representation Elections, The Board Abused Its Discretion By (1) Setting Aside An Election Based On Conduct Not Brought To The Attention Of The Board Until Long After The Time For Filing Objections Had Expired; (2) Arbitrarily Extending Its "Critical Period" Rule To Encompass A Time Prior To The Filing Of The Operative Election Petition; and (3) Without Substantial Evidence, Determining That The "Objectionable Conduct" Took Place Within The Critical Period.

(1) The two member Board panel majority cites *Dawson Metal Products, Inc.*, 183 NLRB 191 (1970) as authority for the proposition that "matters litigated in a com-

⁷ *Leedom v. Kyne*, 358 U.S. 184 (1958).

⁸ *Id.* at p. 188.

plaint case which is consolidated with a representation case can form a basis for setting aside the election even though those matters were not raised by the objections" (A. 56). Member Penello dissented from the election order on this point.

The *Dawson* case is distinguishable from this case because there, unlike here, the unfair labor practice charges were filed on the same day as the objections, and thus well within the Board's five day time limitation for filing objections. NLRB Rules and Regulations, Series 8 (29 C.F.R.) Section 102.69. In this case, the Board has accepted as objectionable conduct matters alleged in an unfair labor practice case which was not started until after the time for filing objections had expired. The solicitation allegations were made seven days after the time limit, while the interrogation allegations were not made until some three months later, when, during the unfair labor practice hearing, the Complaint was amended.⁹ NLRB case law has permitted supplemental objections to set aside an election, but has done so only if they were brought to the attention of the Board during the initial investigation of timely filed objections by the Regional Office. *Albuquerque Publishing Company*, 219 NLRB No. 131, 90 LRRM 1036; *Hecla Mining Company*, 218 NLRB No. 61, 89 LRRM 1886. Those cases make it clear that if the Regional Director has completed his investigation, the Board will not consider as objectionable conduct any matters raised later. In this case, Board case law would, if applied, clearly exclude the interrogation allegations as objectionable conduct.

Respondent does not challenge the fact that the solicitation allegations were brought to the attention of the Board before the Regional Office had completed its investigation into the initial objections. The *Dawson* rationale does de-

⁹ See official transcript, pages 472 and 473, not printed in the Appendix. The allegation of interrogation by Verbert was made in a Motion to amend the Complaint on January 22, 1974, the second day of hearing.

serve judicial review, however, since it operates to indefinitely extend the time for bringing objectionable conduct to the attention of the Board, notwithstanding the Board's stated desire to confine its inquiry. As applied in this case, the *Dawson* time limit is open-ended—as long as a decision was postponed on the objections and the unfair labor practices, new matter would be considered. But in *Dawson*, the unfair labor practice charges were filed within the time period for filing objections, thus there was no real violation of the five day limit established by the Board's Regulations. The Board decision in this case is an unprecedented and retroactive adoption of a new rule which directly conflicts with the Board's stated purposes in fashioning the rules.

(2) The Board also took the opportunity in this case, without substantial explanation of its rationale, to make a major change in its rules regarding the "critical period" for objectionable conduct. The Board has long held that it would not consider as objectionable any conduct which took place before the filing of the election petition which resulted in the election. This policy was based on the concepts of equity and orderly administration. After a thorough review of the Board's historical treatment of this matter, and its policy considerations, the Board in 1971 affirmed the rule, first established years earlier, that "it would be destructive of both underlying concepts to consider conduct allegedly engaged in before the operative petition." *R. Dakin & Company*, 191 NLRB No. 65 (1971), enf. den. 477 F.2d 492 (9th Cir., 1973).

In *Dakin*, as here, there was more than one petition, and the conduct alleged as objectionable occurred before the filing of the operative petition, but after the filing of the first petition. The one difference is that here, unlike in *Dakin*, the objectionable conduct is alleged to have occurred at a time when an earlier petition was in fact on file rather than during the hiatus between the first and the sub-

sequent operative petition. The Board has seized upon this difference to permit it to consider in this case conduct which was engaged in before the operative petition and some two months before the election. Respondent submits that the Board's extension of the *Dakin* rule is both arbitrary and without substantial rationale.

(3) Even if the *Dakin* rule were properly extended, there is not substantial evidence that the alleged objectionable conduct took place during that "critical period". If, as Respondent submits, the interrogation allegations which were not made prior to the hearing cannot be considered as objectionable conduct under Board law, then all that remain as possible objectionable conduct are the card solicitation allegations.

One of the card solicitation allegations, involving employee Nowak, has been found by the Board to have occurred outside the critical period (A. 62). This leaves just 3 incidents on which the Board can rely to set aside the election: the solicitation of Willard by Verbert at the Company picnic; Romer's giving employee Sinsabaugh the slip with the address of the union; and Verbert's offer to give Rosenstock the union's address. Of these three incidents, only the one involving Willard at the picnic took place within the Board's critical period. Rosenstock testified that his conversation with Verbert occurred within a few days after he signed his card on August 8th (A. 157, 161), and was about the time of Grout's August 10th speech. Since the first petition was not filed until August 16th, this cannot be considered objectionable conduct as it did not occur within the "critical period".

Nor can the Romer-Sinsabaugh incident be found to be objectionable conduct. Sinsabaugh wrote his letter requesting his card back on August 16th, the day the first petition was filed (A. 166-167). His testimony unequivocally is that his conversation with Romer regarding the union address took place prior to that time (A. 171-172).

This also is conduct outside of the critical period, and leaves as the sole incident within the critical period, the picnic incident involving Willard. As noted previously (supra pages 12, 15) there is not substantial evidence in the record to establish that this incident, if it happened and if it can be attributed to Respondent, involved any element of coercion.

C. The Board Has Not Articulated Any Reasonable Basis For Its Implicit Holding That The Card Withdrawal Solicitation And Interrogation Of Just Four Employees, Two Months Before The Election, Conduct Which The Union Did Not Bother To Allege As A Basis For Setting Aside The Election, Warranted A New Election.

This Court has held that the Board "should explain in each case just what it considers to have precluded a fair election and why" *General Stencils, Inc., supra*. See generally, *NLRB v. Carpenters Local No. 1913*, 531 F.2d 424 (9th Cir., 1976).

The Board has failed in this case to articulate any reasonable basis for its conclusion that any or all of the conduct engaged in by Respondent in this case interfered with the election so as to warrant setting it aside. Notwithstanding the great latitude given the Board over representation proceedings, it is still incumbent upon it to discharge its functions in something other than a completely arbitrary manner. This court can insist that the Board at least show some rationale for its decisions. Here, the Board has not even attempted to explain how the allegedly objectionable conduct did operate to interfere with the election. Even if the Court upholds the Board on the agency of James Verbert, on the drawing of a presumption of unfavorable testimony of Respondent, on the coercive effect of the card solicitation and the interrogation, on the de minimis issue, on the *Dawson* issue, on

the *Dakin* issue and on the timing of the objectionable conduct issue, the Board has nonetheless not articulated any reasonable basis for concluding that the interrogation and solicitation occurring some two months before the election and involving just 4 of 44 employees constituted interference with the election. Since all of this conduct was in conjunction with a lawful effort of Respondent to persuade employees to stop card-signing, and since that effort had failed and been abandoned six weeks before the election, Respondent submits that the Board's election order is without basis and constitutes an abuse of the Board's discretion.¹⁰

CONCLUSION

For the reasons stated, we respectfully submit that the Application for Enforcement should be denied and that the Board's order directing a new election should be set aside.

Respectfully submitted,

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¹⁰ To the extent the Board election order is viewed as resting on a conclusion that the electorate's ability to cast uncoerced ballots was hampered by the isolated incidents which took place two months before the election, the Board should be held to explain its rationale on another count as well, i.e. the impact of the assurances by the owner of Respondent that reprisals and retaliation were not contemplated, and that a union election win would be followed by good faith bargaining on the part of Respondent (A. 81, 87, 89).

New York Supreme Court Appellate Division

Department

THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

NLRB

VS

MAONROE TUBE CO, INC

State of New York, County of New York, ss.:

HAROLD DUDASH, being duly sworn deposes and says that he is
agent for Sullivan & Hayes, the attorney
for the above named respondent herein. That he is over
21 years of age, is not a party to the action and resides at 2346 Holland Avenue, Bronx, N. Y.

That on the 3rd day of AUGUST, 1976, he served the within brief of respondent
Monroe Tube co


upon the attorneys for the parties and at the addresses as specified below

Elliott Moore esq. deputy associate general counsel, office of the general counsel

NLRB, 1717 Pennsylvania Avenue, N.W. Washington D.C.

by depositing three copies
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly main-
tained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned,
that being the addresses within the state designated by them for that purpose, or the places
where they then kept offices between which places there then was and now is a regular com-
munication by mail.

Sworn to before me, this 3rd
day of august, 1976, 1976


ROLAND W. JOHNSON,

Notary Public, State of New York

No. 4509705

Qualified in Delaware County

Commission Expires March 30, 1977

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